H & R JOHNSON (MALAYSIA) BHD.

v.

H & R JOHNSON TILES LIMITED & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' DR. ZAKARIA YATIM J
[CIVIL SUIT NO. D4-22-1494-92]
3 JANUARY 1995

***INJUNCTION**: Mandatory injunction - Conditions - Whether there must be a strong and clear case - Whether rightful owners of trade marks to be decided at trial.*

***TORT**: Unlawful interference with trade - Whether there must be a contract in existence - Whether acts complained were wrongful.*

Sometime in July 1991, Johnson Malaysia decided to take the necessary steps to secure a listing on the KLSE and for that purpose, appointed Permata Merchant Bank Bhd (Permata) as its listing adviser. By letters dated 22 and 29 October 1992 addressed to Permata and copied to the KLSE and Johnson Malaysia, the defendants by its solicitors falsely and maliciously caused to be written and published of Johnson Malaysia defamatory words which in their natural and ordinary meaning meant and were understood to mean that Johnson Malaysia are not the owners of the trade marks "Johnson" and "H & R Johnson" and that Johnson Malaysia and its board of directors and Permata are misleading or attempting to mislead the investing public as to the ownership of the said trade marks. As a result of the publication of the two letters, Johnson Malaysia has been injured in its reputation and its listing in the KLSE Main Board has been adversely affected and has suffered financial loss and damage. It was further alleged that the said 2 letters constituted deliberate and/or wilful interference by Johnson UK with and/or threat to the trade and business of Johnson Malaysia.

After hearing arguments the Court granted mandatory and prohibitory injunctions against Johnson UK. After Johnson Malaysia was listed in the KLSE Main Board, the defendants applied to set aside and/or vary the said orders.

Held:

[1] Unlawful interference applies to the present case even though there is no contract between Johnson Malaysia and the KLSE. The writing of the two letters was a positive and deliberate act on the part of Johnson UK. Although such act is not forbidden by our legislation such act is definitely wrongful.

[2] After considering all the facts and the circumstances of the case, Johnson Malaysia has an unusually strong case. Because of practical realities of the situation if the mandatory injunction was not granted in favour of Johnson Malaysia, the listing would have to be postponed indefinitely and the price of the shares would be affected to the detriment of the investing public. The employees of Johnson Malaysia had taken out loans to purchase the shares that were being offered in the listing. Johnson Malaysia would suffer a loss of RM300 million and its trade and reputation would be seriously affected. The mandatory order was therefore necessary in order to prevent injustice done to Johnson Malaysia and the public.

[3] The defendants' application to set aside the *exparte* order on the ground that the listing was already done would be "an empty gesture".

[4] The writing of the two letters was wrongful. In any event Counsel for the defendant had conceded that if the contents of the said letters were false then the act was illegal. Johnson Malaysia has pleaded in the statement of claim that the allegations contained in the letters were false. The question of who is the rightful owner of the trade marks will be decided at the trials of the civil suits. That question should not be decided at the interlocutory stage in the present action.

[Defendants' application dismissed].

Cases referred to:
Lonrho Plc. v. Fayed & Ors. [1990] 2 QB 479 ***(foll)***
Torquay Hotel Co. Ltd. v. Cousins & Ors. [1969] 2 Ch. 106 ***(foll)***
Merkur Island Shipping Corporation v. Laughton [1983] 2 AC 570 ***(foll)***
Beaudesert Shire Council v. Smith [1966] 120 CLR 145 ***(foll)***
Dunlop v. Woollahra Municipal Council [1981] 1 AMER 1202 ***(foll)***
Leisure Data v. Bell [1988] FSR 367 ***(foll)***
Columbia Picture Industries & Co. v. Robinson & Ors. [1986] 12 FSR 367 ***(foll)***

Legislation referred to:
Trade Marks Act, 1976

For the plaintiff - T. Thomas & A. Sreevenasan; M/s. Skrine & Co.
For the defendant - V.N. Kandan, Cecil Abraham & Linda Wang; M/s. Shearn Delamore & Co.,

JUDGMENT

Zakaria Yatim J:

On 12 November 1992, the plaintiff (Johnson Malaysia) filed an *ex-parte* application by summons in chambers (encl. 57) seeking the order of the Court in terms of the following prayers:

(1) A mandatory injunction ordering the first defendant (Johnson UK) whether by itself, its directors, officers, employees, servants or agents to withdraw the letters dated 22 and 29 October 1992 written by Messrs. Ram, Rais & Partners and published to the Kuala Lumpur Stock Exchange (KLSE) by writing to the KLSE on terms approved by the Court within 48 hours of the order of the Court, failing which Johnson Malaysia or its solicitors be authorised to write the same thereafter; and

(2) An interlocutory injunction restraining Johnson UK whether by itself, its directors, officers, employees, servants or agents from taking any action whatsoever, whether directly or indirectly, which has the effect of interfering with or threatening the listing of the shares of Johnson Malaysia on the KLSE until trial of the action or further order.

Johnson UK was given notice of the *ex-parte* application and at the hearing of the application on 14 November 1992, Counsel for both parties were present and made their respective submissions.

After hearing both parties, I made an order in terms of prayers 1 & 2 of the *ex-parte* application subject to the plaintiff's undertaking as to damages.

On 9 December 1992, Johnson UK filed an application by summons in chambers (encl. 12) for the following order:

(1) That the order of this Court dated 14 November 1992 be set aside;

(2) Alternatively, that the said order be varied to the extent by deleting para. (b) therefore (para. (b) in the said order is in respect of prayer (2) of the *ex-parte* application)

(3) That there be an inquiry as to damages suffered by the defendants and that the plaintiff do pay to the defendants such damages so ascertained after the enquiry; and

(4) That the costs of and incidental to the application be paid by the plaintiff to the defendants.

I shall first deal with the *ex-parte* application, which was heard *interpartes*.

The facts as pleaded in the statement of claim are as follows: Johnson Malaysia was incorporated on 22 April 1976 as a private limited company under the laws of Malaysia and having its registered office at 32, Lorong Gajus, Senawang Industrial Estate, Seremban. Johnson UK is a company incorporated under the laws of England, having its registered office at Highgate Tile Works, Tunstall, Stoke-on-Trent, England. The second defendant, (Norcros) is a company incorporated under the laws of England, having its registered office at Norcros House, Bagshot Road, Bracknell, Berkshire, England. Both Johnson UK & Norcros are associated companies.

By a joint venture agreement dated 29 December 1976 entered into between Dunlop Malaysia Industries Berhad (Dunlop), Lembaga Tabung Angkatan Tentera (LTAT), Koperasi Polis Di Raja Malaysia (Koperasi Polis) and Norcros, then known as H & R Johnson - Richards Tiles Ltd, it was agreed that the said four joint venture partners would manufacture glazed ceramic wall and floor tiles through the agency of Johnson Malaysia. Each of the joint venture partners agreed to subscribe to the paid up capital of Johnson Malaysia. Clause 14 of the joint venture agreement provides that the said agreement shall subsist for as long as two or more of the original joint venture partners have an equity interest in Johnson Malaysia. By 1991, Norcros & Dunlop had transferred their entire shareholdings under the joint venture agreement in Johnson Malaysia to LTAT. In consequence, 79% of the paid up share capital of Johnson Malaysia belongs to LTAT and the remaining 21% belongs to Koperasi Polis thereby making Johnson Malaysia a wholly Malaysian company. Since the shareholders of Johnson Malaysia are two of the original joint venture partners, the joint venture agreement remains valid and binding pursuant to cl. 14.

On 15 December 1976, Johnson Malaysia & Norcros entered into a technical aid agreement whereby it was agreed, *inter alia*, that Norcros would provide technical assistance and advice to Johnson Malaysia for the manufacture of tiles in consideration of royalty payments. Under the technical aid agreement, Johnson Malaysia was granted the right to use the trade mark "CRISTAL" and any other trade mark or marks which Norcros may apply and obtain from time to time with respect to ceramic tiles. Sometime in July 1977, Johnson Malaysia commenced selling in Malaysia ceramic tiles under the trade mark "Johnson" and subsequently in or about 1988 commenced selling in Malaysia ceramic tiles under the trade mark "H & R Johnson". On 3 June 1991, Johnson Malaysia applied for registration of the trade mark in Malaysia in Class 19 in respect of ceramic tiles pursuant to the Trade Marks Act, 1976.

Johnson Malaysia claims that when it commenced use of the trade mark "Johnson" in Malaysia in 1977, Norcros had not used or applied for the trade marks as trade marks in the United Kingdom or in Malaysia in relation to ceramic titles. Johnson Malaysia also claims that when it commenced use of the trade mark "H & R Johnson" in Malaysia in 1988, Norcros had not used or applied for the trade marks as trade marks in Malaysia in relation to ceramic titles. Johnson UK, however obtained registration of the trade mark "Johnson" in the United Kingdom on 13 March 1984 in Class 19 and on 16 September 1991 Johnson UK applied for the registration of the trade marks in Malaysia. It is contended that Johnson UK was never a party to the joint venture agreement or the technical aid agreement and accordingly Johnson UK cannot assert any claim thereunder against Johnson Malaysia. Neither defendant has

ever used the trade marks in respect of ceramic tiles in Malaysia. By virtue of the extensive use of the trade marks by Johnson Malaysia with respect to ceramic tiles in Malaysia, the trade marks have come to denote the tiles manufactured by Johnson Malaysia and the trade and public in Malaysia associate the trade marks with Johnson Malaysia and no other. Johnson Malaysia claims that it owns the goodwill in the trade marks in Malaysia.

The technical aid agreement between Johnson Malaysia and Norcros was terminated in 1992. From 1 October 1992 no technical agreement subsists between the parties. By a letter dated 6 October 1992, Johnson UK however asserted that Johnson Malaysia no longer had the right to use the trade marks in Malaysia or elsewhere.

Sometime in July 1991, Johnson Malaysia decided to take the necessary steps to secure a listing on the KLSE and for that purpose, appointed Permata Merchant Bank Bhd. (Permata) as its listing adviser. The proposed listing was not connected or linked to the joint venture agreement, the technical aid agreement and the issue of the trade mark. By 16 September 1992, the defendants had actual knowledge of Johnson Malaysia's decision to secure the listing and of its appointment of Permata as its listing adviser. Pursuant to the requirements of the KLSE a prospectus was issued on 28 September 1992 on behalf of Johnson Malaysia containing material information relating to Johnson Malaysia for use in the listing. It is clearly stated in the prospectus that Johnson Malaysia is engaged in the manufacturing and selling of glazed ceramic wall and floor tiles which are marketed under the "Johnson" and "H & R Johnson" brand names.

It is alleged that by a letter dated 22 October 1992 addressed to Permata and copied to the KLSE and Johnson Malaysia, Johnson UK, by is solicitors, Messrs. Ram, Rais & Partners falsely and maliciously caused to be written and published of Johnson Malaysia defamatory words, which in their natural and ordinary meaning meant and were understood to mean that Johnson Malaysia are not the owners of the trade marks "Johnson" and "H & R Johnson" and that Johnson Malaysia and Permata are misleading or attempting to mislead the investing public as to the ownership of the said trade marks. By the second letter dated 29 October 1992 addressed to Permata and copied to KLSE and Johnson Malaysia, Johnson UK, by its solicitors, Messrs. Ram, Rais & Partners caused to be written and published of Johnson Malaysia further defamatory words which meant and were understood to mean that the board of directors of Johnson Malaysia had deliberately withheld vital information and had failed to disclose the facts regarding the trade marks "Johnson" and "H & R Johnson" and calculated to mislead the investing public. As a result of the publication of the two letters, Johnson Malaysia says that it has been injured in its reputation and its listing in the KLSE Main Board has been adversely affected and it has suffered damages.

It is further alleged that Johnson UK deliberately and/or wilfully sent the said letters in order to influence the KLSE to reject the listing or postpone it indefinitely thereby causing to Johnson Malaysia financial loss and damage totalling RM300 million. It is further alleged that the said letters constituted deliberate and/or wilful interference by Johnson UK with and/or threat to the trade and business of Johnson Malaysia, such interference and threat being brought about by unlawful means, namely, making false allegations maliciously and fraudulent or negligent misrepresentations to the KLSE against Johnson Malaysia with the sole purpose of jeopardising the listing to the detriment of Malaysia. It is also alleged that the said letters constituted unlawful, intentional and positive acts carried out by Johnson UK with the inevitable consequence of causing Johnson Malaysia to lose the listing and resultant loss and damage totalling RM300 million.

At the hearing of the *ex-parte* application, Mr. T. Thomas, Counsel for Johnson Malaysia submitted that he was relying on two causes of action. The first cause of action was unlawful interference with trade and business. The second cause of action was that the said letters written by Johnson UK constituted an unlawful acts which caused Johnson Malaysia to lose the listing and to suffer loss and damage. He said that the listing had nothing to do with the joint venture agreement or the question of who owned the trade marks. According to him this was a question which should be decided at the trial and not at the interlocutory stage. He further submitted that on 30 October 1992, Johnson UK was put on notice to withdraw the said letters. No withdrawal letters were however forthcoming. Mr. Thomas further told the Court that the listing was scheduled to take place on 20 November 1992 (i.e., 6 days from the date of hearing). He said that if Johnson Malaysia did not obtain the injunction as prayed in the *ex-parte* application the listing that was scheduled to take place on 20 November would be postponed. The KLSE would then have to make a press announcement and Johnson Malaysia would run the risk of incurring an estimated loss of RM300 million.

Mr. Wong Sai Fong, Counsel for the defendants did not object to the points raised by Mr. Thomas that if the listing did not take place on 20 November it would be postponed again. He submitted however that if the Court made an order in respect of prayer 2, it would not permit the defendants to assert their proprietory interest against whomsoever. He contended that the defendants had a legal right in respect of the trade marks and they should be free to assert such right. Mr. Wong Sai Fong also used the same argument in respect of prayer 1. He disagreed with Mr. Thomas, that the joint venture agreement and the trade marks were totally unrelated to the relief sought in the *ex-parte* application. He then submitted at length on the issue of trade marks.

When considering the *ex-parte* application, I took note of the two causes of action relied upon by Johnson Malaysia. Its main complaint was in respect of the two letters. The first letter which was written by Messrs. Ram, Rais and Partners on 22 October 1992 on behalf of H & R Johnson Tilan Limited was addressed to Permata and copied to the KLSE and Johnson Malaysia. The letter is reproduced below:

22 October 1992.

The Managing Director
Permata Merchant Bank Berhad
27th Floor, Menara Boustead By
69 Jalan Raja Chulan
50200 Kuala Lumpur.

Urgent

Fax transmission
By hand

Dear Sir,

Re: **H & R Johnson (Malaysia) Berhad**

We act for Messrs, H & R Johnson Tilan Limited of Highgate Tile Works, Tunstall, Stoke-on-Trent, ST6 4JX England.

We refer to the prospectus dated 28 September 1992 and issued by the above company. In the said prospectus, reference was made to the use of the trade marks "Johnson" and "H & R Johnson" by the company. The said prospectus contained no acknowledgment that the said trade marks are the intellectual property of our client. The technical aid agreement which permitted the company to use the said trade marks as a licensee of our client expired on 30 September 1992. Upon termination of the said technical aid agreement, the company ceased to be a licensee of our client and had no right to use the trade marks "Johnson" and "H & R Johnson" or any other trade mark or marks which our client might apply and obtain from time to time. In the absence of the renewal of the technical aid agreement for a further term,

the statements in the said prospectus are misleading and are a serious attempt to mislead the investing public in Malaysia. Our client is very concerned and reserves all rights to take the appropriate legal action against all parties in this matter.

Yours faithfully,

Signed.
Ram Rais & Partners

c.c. 1. Client
2. The Kuala Lumpur Stock Exchange
3. H & R Johnson Malaysia Berhad."

The second letter was written on 29 October 1992, by the same firm of solicitors on behalf of the same client which was addressed to Permata and copied to their client and the KLSE. The letter is reproduced below:

29 October 1992.

The Managing Director
Permata Merchant Bank Berhad
27th Floor, Menara Boustead
69, Jalan Raja Chulan
50200 Kuala Lumpur.

Urgent
By fax transmission
By hand

Dear Sir,

Re: **H & R Johnson (Malaysia) Berhad**

We refer to our letter dated 23 October 1992.

We enclose herewith a copy of the letter dated 27 October 1992 from M/s. Skrine & Co., solicitors for the above company. From the statements made in the said letter dated 27 October 1992, it was clear that at the time the prospectus was prepared, the board of directors of the above company had anticipated the dispute about the ownership of the trade marks "Johnson" and "H & R Johnson". In the circumstances, the board of directors ought to have disclosed that there were facts known to them which would lead to serious litigation over a matter highly material to the issue of shares in that it relates to the very goodwill of the company.

Please let us know what steps of action you will be taking over this matter, as advisers and managing underwriters for the above company in its public issue of shares and responsible for the statements made in the prospectus.

Yours faithfully,

Signed
Ram Rais & Partners

Encl.

c.c. 1. Client
2. The Kuala Lumpur Stock Exchange.

In para. 26 and 27 of the statement of claim Johnson Malaysia alleges that in the letter dated 22 October 1992 Johnson UK "... falsely and maliciously caused to be written and published of Johnson Malaysia..." defamatory words, which "... in their natural and ordinary meaning meant and were understood to mean that Johnson Malaysia are not the owners of the trade marks 'Johnson' and 'H & R Johnson' and that they and/or Permata are misleading or attempting to mislead the investing public as to the ownership of the said trade marks ..." In para. 29 of the statement of claim, Johnson Malaysia alleges that the words contained in the letter dated 29 October 1992 "... in their natural and ordinary meaning meant, and were

understood to mean, that the board of directors of Johnson Malaysia ... had deliberately withheld vital information and had failed to disclose the facts regarding the trade marks 'Johnson' and 'H & R Johnson' calculated to mislead the investing public." Paragraph 30 of the statement of claim states:

> 30. By reason of the publication of the said words falsely maliciously in the two letters referred to in para. 26 and 28 above ("the KLSE letters") Johnson Malaysia has been injured in their reputation, and their listing in the KLSE Main Board has been adversely affected and they have thereby suffered and will continue to suffer damage.
>
> *Particulars of False Allegations*
>
> a) The "Johnson" and "H & R Johnson" marks in respect of ceramic tiles in Malaysia are not the intellectual property of the defendants because they did not use or register these marks in Malaysia.
>
> b) The parties to the Technical Aid Agreement are Johnson Malaysia and Norcros (and not Johnson UK). Under cl. 5 (g) therein, all rights and liabilities thereto are personal to the parties. Johnson Malaysia has not consented to any assignment or novation of the rights and liabilities of Norcros under the Technical Aid Agreement to Johnson UK or to any other party. Hence, Johnson UK as a non-party cannot assert any claims thereunder.
>
> (c) In any event, the "Johnson" and H & R Johnson" marks are not the subject matter of the Technical Aid Agreement.
>
> (d) At the time the Prospectus was issued (28 September 1992) there was no dispute and no anticipation of any dispute by Johnson Malaysia's Board of Directors as to the ownership of the trade marks "Johnson" and "H & R Johnson".
>
> (e) By reason of the particulars in (b) to (d) above, Johnson UK was clearly putting forward a claim which it in fact knew or reasonably ought to have known was unfounded.

Johnson Malaysia further alleges that Johnson UK deliberately and wilfully sent the two letters in order to influence the KLSE to reject the listing or postpone it indefinitely.

On 30 October 1992, Messrs. Skrine & Co., solicitors for Johnson Malaysia, wrote to Messrs. Ram Rais & Partners asking them to withdraw the allegations contained in the two letters. The letter written by Messrs. Skrine & Co. is reproduced below:

> 30 October 1992
>
> M/s. Ram Rais & Partners
> Wisma Packer
> 10B Jalan Tunku Abdul Rahman
> 55100 Kuala Lumpur
>
> Dear Sirs,
>
> **The 'Johnson' and 'H & R Johnson'**
> **Trade Marks in Malaysia**
>
> We refer to our letter dated 27 October 1992.
>
> We are instructed that your client has deliberately timed its alleged claim to cause maximum damage to our client's imminent listing on the Kuala Lumpur Stock Exchange. This explains why your client has waited all these years to put forward its alleged claim and further explains why your letter dated 22 October is addressed to the Merchant Bank arranging the listing and copied to the Kuala Lumpur Stock Exchange.

In view of the substantial damage that our client will suffer (which on present estimate could amount to some RM300 million) by reason of your client's false allegations and publication of the same to the Kuala Lumpur Stock Exchange and the Merchant Bank, our instructions are to apply immediately to Court on an *Ex-parte* basis for Injunctive Relief. This could only be averted if your client is prepared to undertake in writing to withdraw such allegations and further undertake not to publish any further allegations, which undertakings must reach us by close of business, Tuesday, 3 November 1992.

Take Note that unless we receive the said undertakings within the specified period, we will apply to Court on or after Wednesday, 4 November 1992, for Injunctive Relief and we will show this letter to the Court.

We will further seek in the proposed action, an Order that service of any *Ex-parte* Court Order that our client may obtain be served upon you as solicitors for your client and by way of fax messages directly to your client.

Yours faithfully,

signed.

c.c. 1) Client - Attn: Dr Zanuldin Ahmad
Fax No. 06-771836

2) M/s. Kadir Tan & Ramlee (solicitors for Permata Merchant Bank Berhad)
Attn: En. Kadir Kassim
Fax No. 238-8431

3) The Kuala Lumpur Stock Exchange,
Blok A Exchange Square of Jalan Semantan,
Damansara Height, 50490 KL

On 3 November 1992, Messrs. Ram Rais & Partners replied saying that they would not withdraw the statements made to the KLSE and to Permata. The letter from Messrs. Ram Rais & Partners is reproduced below:

3 November 1992

M/s. Skrine & Co.
Straits Trading Building
No. 4, Leboh Pasar Besar
50050 Kuala Lumpur.

Dear Sirs,

Re: **The 'Johnson' and 'H & R Johnson'**
Trade Marks in Malaysia

We thank you for your letter dated 30 October 1992.

Our clients maintain that following the expiration of the Technical Assistance Agreement, H & R Johnson (Malaysia) Bhd. has no right to continue using the marks "Johnson" and "H & R Johnson" in Malaysia. In view of the actions of your clients in continuing to use these marks, our client have instructed us to commence proceedings against your clients in respect of both breach of contract and passing off. In those proceedings, our clients shall also be seeking an injunction restraining such further use of the marks together with damages.

We are currently putting together the necessary papers and these will be served on you and your clients in the near future. In the meantime, please let us know whether or not you have instructions to accept service.

In the circumstance, there can be no question of our clients withdrawing the statements made to the Kuala Lumpur Stock Exchange and the Merchant Bank. However, our clients believe that they have fulfilled their duties in notifying the relevant people of the true situation and at present our clients have no intention of repeating those statements to any third parties.

Accordingly, and without any admission of liability whatsoever, our clients are prepared for a period of ten (10) days to undertake that the statements in question will not be repeated to any third parties. However, our client reserves the right to repeat those statements at the end of that then (10) day period.

This undertaking will enable you to make any application which you and your clients think fit in an *interpartes* basis so that our clients can be heard and their case presented. In view of that undertaking, your clients can have no legitimate immediate concern and the need for any *ex-parte* application no longer applies. Should, however, you decide to proceed on an *ex-parte* basis, then we shall show to the Court this letter as indicating that both you and your clients were well aware that there was no danger of any repeat of the allegations in the near future and no need for you to proceed on an *ex-parte* basis and ask for our clients' costs to be paid.

Yours faithfully,

Signed.
Ram Rais & Partners

c.c. 1) Client - By fax transmission

2) M/s. Kadir Tan & Ramlee
(solicitor for Permata Merchant Bank Berhad)
Attn: En. Kadir Kassim
- By fax transmission

3) The Kuala Lumpur Stock Exchange
- By fax transmission

On 6 November 1992, Messrs. Skrine & Co. sent a fax letter to Messrs. Shearn Delamore & Co., who had been retained in place of Messrs. Ram Rais & Partners, informing them that as a result of Johnson UK's action the listing had been delayed and Johnson Malaysia had suffered irreparable damage. The letter from Messrs. Skrine & Co. is reproduced below:

Fax Transmission (Group 3)

From: Miss Ambiga Sreenevasan
Our Ref: AS/tpt/137951.8
Date: 6 November 1992
To: M/s. Shearn Delamore & Co. At Fax No: 03-2322758

Attn of: Datuk Kandan
Your Ref: SD (K) 1395680
No. Of Pages (Including this Page) 1

Subject:

The "Johnson" and "H & R Johnson" Trade Marks in Malaysia

We are in receipt of your letter dated 5 November 1992.

We wish to put on record that as a result of your client's actions, our client has already suffered irreparable damage as their listing has been delayed.

Please note that our clients hold your clients liable for all losses and damages suffered by them as a result of this.

Yours faithfully,

Signed.

I shall now turn to the first cause of action relied upon by Johnson Malaysia, namely, the allegation of unlawful interference with trade. Mr. T. Thosmas cited *Lonrho Plc. v. Fayed & Ors.* [1990] 2 QB 479 to show that he could rely on the first cause of action. In that case the plaintiff issued a writ against the six defendants. The first three defendants were brothers, Mohamed Al Fayed, Saleh Fayed and Ali Fayed. The fourth defendant was a company known as House of Fraser Holdings Plc; the fifth defendant was a director of the sixth defendant, a Merchant Bank. By its statement of claim, the plaintiff alleged that by fraudulent misrepresentations as to the financial ability of the first three defendants to purchase the share capital of House of Fraser Plc. and to invest capital in that company, they had persuaded the board of directors of House of Fraser Plc. to accept therein bid to buy the share capital in the company and persuaded the Secretary of State for Trade & Industry not to refer the bid to the Monopolies and Mergers Commission thereby tortiously depriving the plaintiff of its right to bid for the company's share capital. Fraud was alleged against the fifth and sixth defendants on the ground that they were reckless as to the truth of the representations of the first three defendants. It was further alleged that the defendants had conspired to injure the plaintiff and the sixth defendant acted negligently and in breach of a duty of care owed to the plaintiff as bankers acting for the first four defendants. In his judgment at pp. 487, 488, 489 and 490, Dillon LJ said,

> The third cause of action alleged in the statement of claim is the common law tort of wrongful interference with trade or business. The existence of such a tort is conceded by the defendants. Reference can be made to the speech of Lord Diplock in *Merkur Island Shipping Corporation v. Laughton* [1983] 2 AC 570 where he said, at p. 609:
>
> > In anticipation of an argument that was addressed to your Lordships on the stage 3 point, I should mention that the evidence also established a *prima facie* case of the common law tort, referred to in s. 13(2) and (3) of the (Trade Union and Labour Relations Act) 1974, of interfering with the trade or business of another person by doing unlawful acts. To fall within this genus of torts the unlawful act need not involve procuring another person to break a subsisting contract or to interfere with the performance of a subsisting contract. The immunity granted by s. 13(2) and (3) I will call the 'genus immunity'. Where, however, the procuring of another person to break a subsisting contract **is** the unlawful act involved, as it is in s. 13(1), this is but one species of the wider genus of tort. This I will call the 'species immunity'.
>
> There are also references to this tort in *J.T. Stratford & Son Ltd. v. Lindley* [1965] AC 269 Lord Reid said, at p. 324:
>
> > In addition to interfering with existing contracts the respondents' action made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed.
>
> Viscount Radcliffe said, at p. 328:
>
> > The case comes before us as one in which the defendants have inflicted injury on the plaintiffs in the conduct of their business and have resorted to unlawful means to being this about.

But, although those statements indicate that the tort is a recognised tort, they cannot be taken as comprehensive definitions of what constitutes that tort.

There are several what may be called established exceptions to the generality of those definitions. In particular, although it is not relevant on the facts of the present case, the speech of Lord Diplock in *Lonrho Ltd. v. Shell Petroleum Co. Ltd.* (No. 2) [1982] AC 173, 187 establishes that the mere fact that a person has suffered injury in his business by an act of the defendant which is illegal in the sense of being in breach of a statutory prohibition does not automatically entitle the injured person to bring an action within this tort to recover damages for the injury. The complainant still has to show that on its true construction the statute which imposed the prohibition gave rise to a civil remedy. That has to be considered in the light of the principles examined in *Cutler v. Wandsworth Stadium Ltd.* [1949] AC 398. Furthermore, in *RCA Corporation v. Pollard* [1983] Ch. 135, 153c, Oliver LJ sets out cogently that the action does not lie where the damage complained of is merely economic damage as an incidental result of the breach of a prohibition in a statute not designed to protect the interests of a class to which the plaintiff belongs.

It is submitted to us that, even with this tort, it must, as with the tort of conspiracy, have been the predominant purpose of the tort-feasor to injure the victim rather than to further the tort-feasor's own financial ends. I do not accept that. It would be inconsistent with the way Lord Diplock treated this tort and the tort of conspiracy differently in his speech in *Lonrho Ltd. v. Shell petroleum Co. Ltd.* (No. 2) and in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191, 228-229. No predominant purpose to injure is required where the tortious act relied on is injury by wrongful interference with a third party's contract with the victim or by intimidation of a third party to the detriment of the victim, nor should it in my view be required where the wrongful interference has been by the practice of fraud on a third party, aimed specifically at the plaintiff, as it was put by Oliver LJ in *RCA Corporation v. Pollard* [1983] Ch. 135, 151E-F.

It is also submitted for the defendants that for this tort of wrongful interference with business to apply there must have been a complete tort as between the alleged wrong-doer and the third party against whom the wrong was practised to the detriment of the plaintiff in the action. It is said that that is not the case here, because through fraud was practised,if the allegations of Lonrho are correct, on the Secretary of State to achieve the end that the Secretary of State did not refer Holdings' bid to the Monopolies and Mergers Commission, the tort of deceit requires that the plaintiff should have suffered damage, and the Secretary of State suffered, it is said, no actionable damage. I for my part can see no valid reason why the tort should need, as against the third party, to have been complete to the extent that the third party had himself suffered damage. The distinction drawn by Lord Diplock elsewhere between primary and secondary obligations may be relevant. Apart from that, the need to show that the injured third party had suffered damage, as opposed to the plaintiff having suffered damage, was not a factor in the decision of the majority of this Court in *National Phonograph Co. Ltd. v. Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335. Causation has of course to be proved, but that is a different matter.

It also has to be proved by a plaintiff who seeks to rely on this tort, as Mr. Beveridge conceded for Lonrho, that the unlawful act was in some sense directed against the plaintiff or intended to harm the plaintiff. The origin of those phrases is the oft quoted passage in the speech of Lord Watson in *Allen v. Flood* [1898] AC 1, 96, which was applied by the majority of this Court (Buckley and Kennedy LJ) in *National Phonograph Co. Ltd v. Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335. In that case the fraud was clearly directed against the plaintiff ...

a ... Here the existence of this tort is recognised, but the detailed limits of it have to be refined. I regard it as right and, indeed, essential that this should be done on the actual facts as they emerge at the trial rather than on a set of hypotheses, more or less wide, in very comprehensive pleadings. This is very far from being a case in which there is no conflict as to the facts, and the matters in conflict involve questions of intention, purpose, motive or probability. We have the general framework of the law which falls to be applied to this case laid down, and to a considerable extent refined as a result of this application. But the actual application of b that law to the facts of the case should, in my judgment, be a matter for the trial of the action.

However, there is one further point which I ought to mention before concluding this judgment. It is submitted for the defendants, and particularly by Mr. Oliver for the Fayeds and Holdings, that what deprived Lonrho to the Secretary of State in 1981. There were in truth two things which realistically, by their combined effect, prevented Lonrho from bidding for the share c capital of House of Fraser in March 1985. One was that the 1981 undertaking was not released by the Secretary of State until 14 March. The other was that before that date Holdings had, by purchases in the market in addition to its purchase from Lonrho, achieved an unconditional majority holding of over 50 per cent. of the share capital in House of Fraser. There is no suggestion at all that the Fayeds achieved by fraud that the release by the Secretary of State of the undertaking was deferred until later than would otherwise have been the case or too late for the release to do Lonrho any good. Equally, there is no suggestion in the statement d of claim, so far as I have seen, that the acquisition of over 50 per cent in total by purchases in the market was procured by the pleaded fraud on the part of the Fayeds and the other defendants. *Prima facie*, therefore, the pleaded fraud was not causative of the deferment of the release of the undertaking or of the acquisition by Holdings of over the 50 per cent, level of the share capital of House of Fraser. Mr. Oliver submits, therefore, that there is no case on causation for the defendants to meet ...

e ... It is pleaded in the present case that the fraudulent misrepresentations relied on, and in particular those made in March 1985 to influence the Secretary of State, were intended to have continuing effect. The continuing situation is dealt with in para. 48 and 49 of the statement of claim. Those paragraphs may not perhaps be worded as clearly as they might be, but the situation, as I understand it, that they are seeking to deal with is that by the fraud alleged in the statement of claim, if it was directed against Lonrho in the sense of that requirement f which will have to be explored at the trial, Lonrho has been deprived of the opportunity of bidding, not merely at or before 14 March 1985, but at any time when there would have been a divestment order as a probable consequence of a reference to the Monopolies and Mergers Commission, which would probably have been made if the truth had been disclosed to the Secretary of State at the outset before the 14 March 1985, or, if the truth had become known to the Secretary of State, at a stage when to direct a merger was still within his powers under the Act. In other words, what is alleged is a continued deprivation, not merely of a right to g bid at the outset, but of a right to bid if there were to be directions to Holdings and the Fayeds to divest themselves of what they had acquired.

Whether or not that can be made out is a matter for investigation, in my judgment, at the trial of the action. It is not right to endeavour to try complicated issues of causation on a striking out application on what might or might not appear to be on paper, on the balance of probabilities, the foreseeable outcome of a trial.

h Ralph Gibson LJ in his judgment at p. 491 said,

The tort of unlawful interference in business may still be described in our law as new. Lord Denning MR in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 AC 191 so referred to it. It is, of course, more familiar to us when the unlawful means used is intimidation or procuring the breach of or interference with a contract. It is not, I think, disputed by the defendants

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that if the unlawful means alleged in this case had been fraudulent misstatements made to the Secretary of State and denigrating Lonrho, the action might arguably fall within the definition of the tort, but it was contended that the use of fraudulent misstatements to the Secretary of State, which served only to improve the reputation and standing and the supposed assets of the Fayeds could not, as a matter of law, be held to have been directed against Lonrho.

At p. 492, the learned Lord Justice said,

There were other points urged upon the Court for the defendants, which have been described by Dillon LJ, but I would hold that they are not such as to justify striking out this action. This is a comparatively new tort of which the precise boundaries must be established from case to case. Those points include, first, the nature of the intention which is required to satisfy the requirement that the conduct be "directed against" the plaintiffs, in particular where the fraudulent misstatement is made by A to B about A himself in order to cause B to act in such a way that A obtains or retains a commercial advantage over C or deprives C of a commercial advantage; secondly, the nature of the business interest by reference to which the plaintiff must prove that he has been damaged; thirdly, whether there is sufficient nexus of directness of impact and consequence between the unlawful means employed and the alleged loss causing effect upon the plaintiffs; and, fourthly whether the damage alleged is sufficient to support the existence of a cause of action.

From the passages quoted above, it is evident that in England unlawful interference with trade is still a developing tort. Woolf LJ said in the same case, "The tort ... of unlawful interference is still ... of uncertain ambit, albeit that its existence is now beyond doubt and certain of its features are clearly defined." Although *Lonrho* case was a case of striking out, in my view the principles laid down in that case relating to unlawful interference with business apply to the present case.

The question that has to be considered here is the meaning of the word "unlawful". In *Torquay Hotel Co. Ltd. v. Cousins & Ors.* [1969] 2 Ch. 106, Lord Denning MR in his judgment at p. 139 said that:

... if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract ...

In my view Lord Denning's definition of the word "unlawful" applies to the present case even though in the present case there is no contract between Johnson Malaysia and the KLSE. In *Merkur Island Shipping Corporation v. Laughton* [1983] 2 AC 570 the ship owners by their writ claimed damages from the defendants. The claim was under two heads:

(1) Damages for deliberate interference with and/or threat to the performance of a time charter dated 12 February 1982, between the plaintiffs and Leif Hoegh and Co. Aktieselskab, such interference and/or threat being brought about by unlawful means, namely wrongfully procuring and/or inducting and/or threatening to procure or induce lock-keepers and/or tugmen and/or pilots and/or boatmen and/or linesmen and/or other concerned with the free passage and operation of vessels at Liverpool to refuse to assist the free passage or working of the **Hoegh Apapa** at Liverpool.

(2) Damages for deliberate interference with and/or threat to the trade and business of the plaintiffs, such interference and/or threat being brought about by unlawful means namely wrongfully procuring and/or inducing and/or threatening to procure or induce lock-keepers and/or tugmen and/or pilots and/or boatmen and/or linesmen and/or others concerned with the free passage and operation of vessels at Liverpool to refuse to assist the free passage or working of the **Hoegh Apapa** at Liverpool."

The above claims were the basis of the claim for injunction. In that case the injunction was granted.

I shall now deal with the second cause of action. Mr. Thomas said that this was a *Beaudesert* cause of action and he cited *Beaudesert Shire Council v. Smith* [1966] 120 CLR 145; and *Dunlop v. Woollahra Municipal Council* [1981] 1 AMER 1202. In *Beaudesert* case, the Australian High Court, in its judgment at p. 152 said,

> It appears to us, therefore, that if what the appellant did was actionable at the suit of Smith and his personal representatives for damage suffered thereby, liability must depend upon the broad principle that the Council intentionally did some positive act forbidden by law which inevitably caused damage to Smith by preventing the continuing exercise of his rights as a licensee in the manner in which they had been enjoyed for some thirteen years. Such a cause of action must, we think, be found either in, or by analogy with, an action on the case for trespass.
>
> In our consideration of whether the respondents' action can be supported as an action on the case independently of trespass, nuisance or negligence, we are indebted to A.K. Kiralfy, the author of an historical study of *The Action On The Case*. We do not propose to take up the author's historical research; rather we will refer to a number of the authorities he has collected relating to actions of trespass on the case and add one or two further references. These authorities are, in the main, cases where breach of duty owed to persons directly affected by wrongful acts caused damage to other persons. Thus, to quote from *The Earl of Shrewbury's* Case.

At pp. 155 & 156, the Court said,

> There is, therefore, a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another. It is not, however, possible to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of the law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury. Bearing this in mind, it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other. It may be that a wider proposition could be justified, but the proposition we have stated covers this case and leads us to the conclusion that the appellant is liable to the respondents for loss occasioned by its unlawful trespass in removing gravel from the river-bed.

Dunlop case is a Privy Council decision on an appeal from Australia. In that case the Privy Council decided that the "principle of law that a person was entitled to recover damages in an action on the case for loss or harm suffered as the inevitable consequence of the unlawful, intentional and positive act of another only applied if the act was illegal or forbidden by law and did not apply to an act which was merely null and void and incapable of affecting legal rights.

Mr. Thomas submitted that the writing of the two letters was a positive and deliberate act on the part of Johnson UK. I have not been told that such act was forbidden by our legislation but I am satisfied that such act is definitely wrongful.

In my view Johnson Malaysia is entitled to rely on the two causes of action.

I shall next deal with the question of mandatory injunction. Mr. Thomas referred to the case of *Leisure Data v. Bell* [1988] FSR 367. In that case the English Court of appeal decided that since a mandatory injunction was likely to be more drastic in its effects than a prohibitory injunction, the case had to be usually strong and clear before a mandatory injunction could be granted at the interlocutory stage. A higher standard was to be applied. The Court of Appeal also decided that where the practical reality of a situation was such that it was necessary for some form of mandatory order to be made in the interim, the Court would make the order whether or not the high standard of probability of success at trial was made out. In that case Dillon LJ in his judgment at p. 372 said that the "... Court is required ... to give full weight to the practical realities of the situation and weigh the respective risks that injustice may result from a decision one way or another ... the Court has to keep firmly in mind the risk of injustice to either party ..."

In the present case, I have considered all the facts and the circumstances of the case, and I was satisfied that Johnson Malaysia has an unusually strong case. I took into consideration the practical realities of the situation and decided that if the mandatory interlocutory injunction was not granted in favour of Johnson Malaysia, the listing would have to be postponed indefinitely and the price of the shares would be affected to the detriment of the investing public. The employees of Johnson Malaysia had taken out loans to purchase the shares that were being offered in the listing. Johnson Malaysia would suffer a loss of RM300 million and its trade and reputation would be seriously effected. The mandatory order was therefore necessary in order to prevent injustice done to Johnson Malaysia and the public.

With regard to the second prayer, I am satisfied that there are serious questions to be tried in this case. I find that the balance of convenience is in favour of Johnson Malaysia.

In the circumstances I made an order in terms of prayers 1 & 2 of the *ex-parte* application.

At the hearing of the application to set aside the *ex-parte* order, Datuk Kandan, Counsel for the defendants submitted that in respect of the first part of the order, the listing was already done and that part of the order should be set aside. With regard to the second part of the order, he said that it was too wide. He further submitted that the said two letters did not cause injustice to Johnson Malaysia and there was therefore no unlawful interference. He said that if "it is false then they are right in saying it is illegal." He further said that "Court has to determine ... whether that allegation is false or not ... if that is not false then there should not be an injunction granted ..." He then delved at length on the defendants' rights to the trade marks.

Miss Sreenevasan, Counsel for Johnson Malaysia submitted that the *ex-parte* order should not be disturbed even though the listing had already taken place. She said that the matter should be left to the trial. She referred to the *Supreme Court Practice* [1993], vol. 1 p. 535 and the case of *Columbia Picture Industries & Co. v. Robinson & Ors.* [1986] 12 FSR 367. With regard to the question of unlawful interference, she said, "I think there has been a concession by my friend if what is stated in the letter is false ... the plaintiff has the right to say that the act was illegal ..."

On Datuk Kandan's argument that the *ex-parte* order should be set aside on the ground that the listing had already been done, I agree with Miss Sreenevasan's submission that the matter should be left to the trial. In *Columbia Picture Industries v. Robinson*, Scott J said at p. 448,

The defendants seek an order setting aside the *ex-parte* order and damages or an inquiry as to damages pursuant to the plaintiffs' cross-undertaking in damages contained in the order. I will deal first with the question whether the order should be set aside for non-disclosure.

It is a somewhat bizarre proposition. The **Anton Piller** order was executed on 21 June 1982, some three-and-a-half years ago. Setting it aside now would be a gesture devoid of practical effect. The extent to which the defendants are entitled to recover damages under the cross-undertaking does not, as I see it, depend upon whether or not the order is formally set aside.

As to the remaining parts of the order, the negative interlocutory injunctions all expire automatically with this judgment. Final injunctions based on the result of the plaintiffs' action take their place.

Mr. Beveridge pressed me very hard with a number of authorities which establish, he submitted, the principle that, where an interlocutory injunction had been obtained with inadequate disclosure of material evidence known to the applicants or their agents, the respondent was entitled to have the injunction set aside *ex debito justitiae* and without more ado or further inquiry. There is, in addition, clear authority that the fact than an **Anton Piller** order has been executed is no reason why it should not be set aside. The Court of Appeal, in *Booker McConnell v. Plascow* to which I have already referred, so held. At p. 435 Kerr LJ said this:

> In my view, it is quite clear from these two decisions that in appropriate cases the Court will discharge orders of this kind even after they have been fully executed.

At p. 450, the learned Judge said,

As a matter of judicial discretion, a first instance Judge will not set aside or vary an *inter partes* interlocutory order made by a brother first instance Judge unless the application to set aside or vary is made on the basis of fresh material not before the Court when the original interlocutory order was made. If no new material is relied on, or if the only new material is material that the applicant could and ought to have placed before the Court on the original application (the applicant to set aside or vary being the respondent to the original application) then the original order can only be disturbed on appeal. But the respondent to an *ex parte* order who *ex hypothesi*, has not been heard at all on the application for the order, can, in my view, make an interlocutory application at any time for a review of the order. The significance of the return date is that it provides a fixed date on which the respondent, if so advised, can apply to vary or set aside. It does not, in my judgment, preclude a respondent who does not take advantage of the return date from applying subsequently.

Mr. Bateson's substantive point is the one to which I have already referred. How can it be right to countenance an application to set aside a mandatory interlocutory order which has been wholly executed where the application is not made until 18 months thereafter and is not dealt with until final trial of the action? The common sense of this objection seems to me overwhelming.

The many authorities to which I have already referred that establish the propriety of setting aside an executed **Anton Piller** order where the obtaining of the order has been attended by inadequate disclosure were all cases where the application to set aside was made reasonably soon after the execution of the order and where it was at least possible that the setting aside of the order could have had some practical effect. I do not take the judicial expressions of opinion in those cases as a guide to the action I should take in this case, where the decision as to whether or not to set aside the order had to be made after final trial.

The defendants have, in my judgment, by reason of the serious defects in the evidence placed before Goulding J to which I have already referred, established grounds for the setting aside of the order. If I were satisfied that there would be any practical advantage to them in the setting aside of the order, I would do so. But I am not satisfied in this. The level of damages

to which, under the cross undertaking in damages, the defendants are entitled does not, in my judgment, depend on whether or not the order is first set aside. I do not think the setting aside of the order is necessary in order to mark my disapproval of the manner in which it was obtained, nor, for that matter, of the manner in which it was executed. I hope that the terms of this judgment will have done that.

I am instinctively disinclined to make by judicial order what seems to me an empty gesture. I do not, therefore, propose to set aside the order.

In my opinion the application to set aside the *ex-parte* order on the ground that the listing was already done would be, to quote Scott J, "an empty gesture".

On the question of unlawful interference, I have already said earlier that the act of writing the two letters was wrongful. In any event, Datuk Kandan had conceded that if the contents of the said letters were false then the act was illegal. Johnson Malaysia has pleaded in the statement of claim that the allegations contained in the letters were false.

The question of who is the rightful owner of the trade marks will be decided at the trial of this action and at the trial of Civil Suit D5-22-1505-92. That question should not be decided at the interlocutory stage in the present action.

For the reasons above, I dismissed the application (encl. 12) with costs.